Supreme Court, U.S.
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No. 00-505

IN THE

Supreme Court of the United States

CAROLYN H. SRIVASTAVA,

Petitioner,

v.

TRUSTEES OF INDIANA UNIVERSITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

DOUGLAS B. KING
Counsel of Record
MICHAEL RABINOWITCH
WOODEN & MCLAUGHLIN LLP
Attorneys for Respondent
1600 Capital Center South
201 North Illinois Street
Indianapolis, Indiana 46204
(317) 639-6151

163304

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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OPINIONS BELOW

The opinion of the Court of Appeals [Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit ("Petition"), Appendix A, pp. 1-7], dated July 11, 2000, an unpublished opinion. The Judgment Awarding Attorneys' Fees and Entry on Defendants' Motion for Award of Attorneys' Fees and Costs and Other Pending Matters (Petition, Appendix B, pp. 10-14) dated August 27, 1999, both of which are unpublished.[1]

PRELIMINARY STATEMENT

The Petition for Writ of Certiorari should be denied because there is no special or important reasons for granting review. The Seventh Circuit's decision does not decide an important question of federal law, has absolutely no national impact, does not present a conflict with decisions from other circuits, and is consistent with this Court's holding in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). In addition, the Seventh Circuit was correct when it ruled that the District Court did not abuse its discretion when it awarded attorney's fees in favor of the Respondent, the only ruling on appeal in this case, in light of Petitioner's frivolous claims and baseless and repetitive filings after summary judgment had been entered.

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1. In the Petition, Petitioner also identifies "[t]he prior opinions of the United States District Court for the Southern District of Indiana, case number IP98-0242-C-H/G, entered September 9, 1999, August 26-27, 1999, July 1, 1999, June 4, 1999, May 27, 1999, and October 18, 1999", as opinions that are now on appeal and before this Court. Such opinions and orders were not on appeal to the Circuit Court and are not now before this Court.

STATEMENT OF THE CASE

Petitioner's Statement of the Case, which includes her "Statement of Material Facts" and discussion of a "Previous Action", contains irrelevant facts that are not supported by evidence in the record on appeal and addresses issues which were not before the District Court or the Circuit Court when it affirmed the District Court's award of attorney's fees in favor of the Respondent. The following Statement of the Case addresses only the facts and procedural history pertinent to the opinion of the District Court that was on appeal to the Circuit Court.

I. Statement of Material Facts

The Petitioner was hired by Respondent as an Assistant Professor in the Indiana University School of Medicine (IUSM) as a "tenure probationary" employee for a period to begin July 1, 1993, and ending June 30, 1996. On March 16, 1995, the Petitioner was notified of the Respondent's decision to not reappoint her to the IUSM faculty at the expiration of her existing period of employment on June 30, 1996. The Petitioner was informed that the reasons for her non-reappointment were that she was unlikely to obtain external grant support and after careful consideration of overall performance. On November 22, 1995, the Petitioner was placed on a paid leave of absence until her contract expired on June 30, 1996.

The Respondent's decision not to reappoint the Petitioner to the IUSM faculty is not at issue in this case. The Petitioner raised that issue in the earlier filed case of *Srivastava v. Dr. Richard L. Schreiner, et al.*, Cause No. IP97-0704 C-M/S (hereinafter referred to as "*Srivastava I*").

In *Srivastava I*, the District Court for the Southern District of Indiana, Indianapolis Division, the Honorable Larry J. McKinney, District Judge, entered summary judgment against Petitioner and in favor of the defendants.

In this case, the Petitioner alleges that, even after the non-reappointment decision was made, she applied for and was under consideration for a position as the Chairman of the Department of Microbiology and Immunology at IUSM.

On August 29, 1997, the Petitioner filed her EEOC Charge, Charge No. 240972835, in which she alleged:

> I filed EEOC charge number 240961901 on June 12, 1996. From approximately December 1996 through July 1997, I petitioned for the position of Microbiology Chairperson in the I.U. School of Medicine. On April 25, 1997, I was informed by Dean Holden that I was not under consideration and that the School of Medicine would not meet with me further to discuss any position. I petitioned Dean Holden on July 7, 1997 regarding the position and was informed that I could not return to the I.U. School of Medicine. "I believe I am being retaliated against in not being considered for the Microbiology Chairperson position for filing a previous EEOC charge in violation of the Americans with Disabilities Act of 1990, as amended."

Petition, App. D, p. 50.

II. Relevant Procedural History (Summary of Vexatious Court Filings that Unreasonably Prolonged this Litigation)

On February 20, 1998, the Petitioner commenced this lawsuit by filing a second Civil Rights Complaint against Respondent, in which she alleged discrimination based on violations of the ADA, retaliation by Respondent in response to Petitioner's filing of her first Charge of Discrimination filed with the EEOC on June 12, 1996 (the charge at issue in *Srivastava I*), and alleged civil rights violations actionable under 42 U.S.C. § 1983.

Thereafter, the Petitioner, on at least three separate occasions (before the District Court finally allowed her one last chance to amend her Complaint), attempted to amend her Complaint to assert claims under Title VII for sexual harassment and withdrew all of her claims relating to disability discrimination based on violations of the ADA. On September 10, 1998, in its Entry on Pending Motions and Order to Show Cause Why Summary Judgment Should Not Be Granted ("Show Cause Entry"), the District Court recognized that Petitioner had been a "moving target" in her lawsuits against Respondent, constantly amending her Complaints and allegations each time Respondent attempted to respond. The District Court further noted that Petitioner not only had revised her allegations in *this* lawsuit three times alone (as of that time — she would do so several times thereafter), but that she had also done so in her previous lawsuit against Respondent, *Srivastava I*.

Nonetheless, the District Court granted the Petitioner's latest Motion to Amend Complaint, stating that, "[i]ndulging plaintiff in this last effort at presenting a moving target,

the court will treat the *Revised Amended Complaint [Under Title VII for Discrimination]* as her definitive statement of her claims." The District Court then ordered Petitioner to show cause why summary judgment should not be granted against her.

After the issues the District Court requested the parties brief in its Show Cause Entry were fully briefed, on May 27, 1999, the District Court, in its Entry Granting Summary Judgment and Striking Scandalous, Irrelevant, Redundant, and Late Filings ("Summary Judgment Entry"), granted summary judgment to Respondent and against Petitioner because, in the Court's own words, "the undisputed facts show that Srivastava never took to the EEOC her current charges of sex discrimination and retaliation for complaints of sex discrimination."

In the Court's Final Judgment (part of its Summary Judgment Entry) the District Court entered "final judgment in favor of defendant Indiana University, *with costs*." On July 6, 1999, Respondent filed its Bill of Costs for $489.75.

On June 2, 1999, Petitioner filed her first Notice of Appeal in this case, appealing the Summary Judgment Entry of May 27, 1999. The United States Court of Appeals for the Seventh Circuit docketed that appeal on June 4, 1999, as Docket No. 99-2427. However, on August 16, 1999, Petitioner filed her Plaintiff-Appellant's Motion to Dismiss Appeal, which the Seventh Circuit granted, pursuant to Fed. R. App. P. 42(b).

Meanwhile, at the same time she filed her first Notice of Appeal, on June 2, 1999, Petitioner filed her (First) Motion

for Partial Relief from Judgment, in which she asked the District Court reconsider its decision to award costs to Respondent as set forth in the Summary Judgment Entry.

On June 4, 1999, the District Court denied Petitioner's (First) Motion for Partial Relief From Judgment, and in doing so clarified its award of costs, stating that "[t]he costs awarded are those itemized in 28 U.S.C. § 1920, to the extent applicable in this case." Despite the District Court's denial of Plaintiff's Motion for Partial Relief from Judgment, and its further explanation to Petitioner that the costs awarded were only those itemized in 28 U.S.C. § 1920, Petitioner continued to file documents in further support of her Motion for Partial Relief from Judgment, including her Plaintiff's Brief in Support of Motion for Partial Relief from Judgment and Plaintiff's Supplement to Brief in Support of Motion for Partial Relief from Judgment.

On July 1, 1999, the District Court, for a second time, denied Plaintiff's Motion for Partial Relief from Judgment.

On July 6, 1999, based on Respondent's continued groundless filings in pursuit of this case, Respondent filed IU's Motion for Award of Attorney's Fees, which the District Court granted on August 27, 1999, for the reasons explained in the Judgment and at the August 26 hearing. See Petition, App. B, pp. 10-19.

On July 12, 1999, Petitioner filed Plaintiff's Motion for Reconsideration of Judgment, in which she requested the District Court reconsider its award of costs in favor of Respondent for a third time, and, among other things, accused Respondent's officials of perjury and intimidation.

On August 10, 1999, Petitioner filed Plaintiff's (1) Reply Brief in Support of Motion for Reconsideration of Judgment; (2) Reply to IU's Request to Strike Affidavits; and (3) Rule 60(b) Motion for Relief from Judgment and to Amend Complaint, in which she accused the undersigned lead counsel for Respondent and Respondent's associate general counsel of intimidation and harassment, based on their phone call to her to try to informally resolve this case.

On August 26, 1999, a hearing was held on IU's Motion for Award of Attorney's Fees. At the conclusion of that hearing, the District Court granted Respondent's Motion, for the reasons explained by the Court at length to Petitioner (and Respondent) in open court. Thereafter, on August 27, 1999, the Court entered its Judgment, which the Petitioner then appealed to the Seventh Circuit.

On July 11, 2000, the Seventh Circuit affirmed the District Court's award of attorney's fees in favor of the Respondent holding that the District Court "did not err in accepting the motion [for award of attorney's fees], particularly in light of Srivastava's baseless and repetitive filings after summary judgment had been entered and her first post-judgment motion had been denied." Petition, App. A., p. 7. The Seventh Circuit panel added "[t]he record in this case demonstrates that Srivastava vexatiously pursued this litigation long after it became apparent that she did not fulfill a condition precedent to filing a Title VII lawsuit." *Id.*, at p. 5.

REASONS FOR DENYING THE WRIT

The Petition fails to present any compelling reason for granting review and this case does not decide an important issue of federal law or of national importance. The Petitioner's claims in this case have been vexatious and frivolous from the beginning and she has unreasonably prolonged this litigation. The only issue on appeal to the Circuit Court was whether the District Court abused its discretion when it granted Respondent's Motion for Award of Attorney's Fees in favor of Respondent and against Petitioner. The Seventh Circuit was correct in holding that the District Court did not abuse its discretion.

In addition, there is no conflict between the circuits with respect to awarding attorney's fees in favor of a "prevailing party" in a Title VII action. The Seventh Circuit's decision to affirm the District Court's award of attorney's fees in favor of the Respondent is consistent with the longstanding decision of this Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) and decisions from the Seventh Circuit and other circuit courts.

Finally, although the Petition raises issues regarding the substantive bases for the District Court's grant of summary judgment in favor of the Respondent, i.e. that the Petitioner failed to exhaust her administrative remedies under Title VII, the District Court's ruling in that regard was not before the Circuit Court and is not now on appeal, having been voluntarily dismissed by the Petitioner on August 16, 1999. Notwithstanding, even if the District Court's entry of summary judgment in favor of the Respondent were on appeal, there is no conflict among the circuits regarding the plaintiff's duty to exhaust administrative remedies under Title VII before filing a lawsuit in federal court and there is no compelling reason for this Court to consider that issue.

ARGUMENT

I. There is Absolutely No Compelling Reason for Granting Review; This Case Has No National Impact and There is No Conflict Among the Circuit Courts

Petitioner's appeal of the District Court's award of attorney's fees in favor of the Respondent as the "prevailing party" under 42 U.S.C. § 2000-5(k) and the Seventh Circuit's opinion that the award was not an abuse of discretion does not implicate any issue of great public concern; has absolutely no national impact; and presents no other "compelling reason" why the Petition should be granted. *See Rice v. Sioux City Memorial Park Cemetery*, 249 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)) ("A writ of certiorari should not be granted except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.")

Similarly, the Seventh Circuit opinion presents no "real and embarrassing conflict" between the circuit courts regarding recovery of attorney's fees under 42 U.S.C. § 2000-5(k). The Supreme Court clearly addressed the question of when attorney's fees can be awarded to a defendant who is the prevailing party in a Title VII action in *Christiansburg*, 434 U.S. at 421, and that standard applies today. There is no conflict among the circuits and Petitioner has identified absolutely no valid reason to change the *Christiansburg* standard. *See, e.g.*, *Bercovitch v. Baldwin Sch., Inc.*, 191 F.3d 8, 11 (1st Cir. 1999); *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 765, 770 (2d Cir. 1998); *Pennsylvania*

v. Flaherty, 40 F.3d 57, 60 (3d Cir. 1994); *Bryant Woods Inn. v. Howard County*, 124 F.3d 597, 606 (4th Cir. 1997); *Kasuri v. St. Elizabeth Hosp. Medical Center*, 897 F.2d 845, 854 (6th Cir. 1990). *Marquart v. Lodge 837, International Association of Machinists and Aerospace Workers*, 26 F.3d 842, 849 (8th Cir. 1994); *Herb Hallman Chevrolet, Inc. v. Nash-Holmes*, 169 F.3d 636, 645 (9th Cir. 1999); *Bruce v. City of Gainesville, Georgia*, 177 F.3d 949, 952 (11th Cir. 1999).

Petitioner contends that certiorari should be granted in this case to clarify and more precisely define the standards set forth in *Christiansburg*. However, neither this Court nor any circuit court has applied *Christiansburg* in a conflicting manner. In fact, the clarity and wide spread acceptance of this standard was furthered when this Court extended the *Christiansburg* standard for awarding fees to § 1983 cases and cases brought under the Americans with Disabilities Act. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *Wilson-Simmons v. Lake County Sheriff's Dep't*, 207 F.3d 818, 823 (6th Cir. 2000); *Mylett v. Jeane*, 910 F.2d 296, 299 (5th Cir. 1990).

Petitioner seeks to create confusion where none exists. Merely because circuit courts apply the *Christiansburg* standard on a case-by-case basis does not equate to the need to clarify or further define this already-established rule. Petitioner's suggestion that this Court should now set forth specific guidelines for awarding attorney's fees to a prevailing defendant, above and beyond those expressed in *Christiansburg*, is not only unnecessary, but impracticable, given the fact-specific situations in which a district court decides whether or not to award such fees. This Court clearly expressed its intent to avoid the impractical rigidity that

Petitioner suggests when in *Christiansburg* it stated that "a District Court may *in its discretion* award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in and subject to bad faith." *Christiansburg*, 434 U.S. at 418-21. (Emphasis added).

In her Petition, the Petitioner suggests there is a conflict between the Ninth Circuit's opinion in *Herb Hallman Chevrolet, Inc. v. Nash-Holmes*, 169 F.3d 636, 645 (9th Cir. 1999) and the Eleventh Circuit's holding in *Bruce v. City of Gainesville, Georgia*, 177 F.3d 949, 952 (11th Cir. 1999). Application of the *Christiansburg* holding in these two cases is not in conflict; the Ninth and Eleventh Circuits simply applied the *Christiansburg* standard to different factual situations.

In *Herb Hallman Chevrolet*, the Ninth Circuit considered the plaintiff's survival of a motion to dismiss and genuine dispute of the district court's ruling when it reversed the district court's award of attorney's fees in favor of the defendant. *Herb Hallman Chevrolet*, 169 F.3d at 645-646. In *Bruce*, the Eleventh Circuit considered the plaintiff's reasonable belief that he was terminated because of his disability when it reversed the district court's award of attorney's fees in favor of the defendant. *Bruce*, 177 F.3d at 952-953. There is certainly no "real and embarrassing conflict" between the circuit courts for resolution by this Court and there is no basis to grant certiorari in this case.

In summary, because the Circuit Court's affirmation of the District Court's award of attorney's fees in favor of the Respondent does not implicate any issue of great public

concern; has absolutely no national impact; and there is no conflict among the circuit courts regarding the *Christiansburg* standard, the Petition should be denied.

II. The Award of Attorney's Fees in Favor of the Respondent is Clearly Discretionary and Warranted Under the Circumstances; Petitioner's Claims are Frivolous and She Has Unreasonably Prolonged the Litigation

In affirming the District Court's award of attorney's fees in favor of the Respondent, the Seventh Circuit panel stated:

> The record in this case demonstrates that Srivastava vexatiously pursued this litigation long after it became apparent that she did not fulfill a condition precedent to filing a Title VII lawsuit. As IU first pointed out in its objection to Srivastava's motion to amend her complaint, she was required to present her Title VII claims first to the EEOC in a charge of discrimination, * * *. . . . Nevertheless, Srivastava continued to inundate the district court with filings, including her own motion for summary judgment and another motion to amend her complaint. Even after the district court granted judgment to IU, Srivastava prolonged the suit needlessly by filing successive and untimely post-judgment motions. Finally, throughout the litigation, the district court struck documents from the record at least six times because the documents contained, in the court's own words, "scandalous, irrelevant, redundant, and late" allegations against IU and IU's attorneys. Considering Srivastava's

> conduct during this litigation, even after it was plain that established case law precluded her Title VII claims, the district court did not abuse its discretion in awarding attorney's fees to IU.

Petition, App. A, p. 5.

An award of attorney's fees in favor of a prevailing defendant is clearly discretionary. *See Christiansburg*, 434 U.S. at 416, 422. (A district court may in its discretion allow attorney's fees to the prevailing party; a plaintiff should be assessed his opponent's attorney's fees upon a finding that her claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so"). Applying the *Christiansburg* standard, the District Court clearly did not abuse its discretion

A. The Petitioner's Complaint is Frivolous, Unreasonable, and Groundless on its Face

The Petitioner's underlying claim in this case, that the Respondent discriminated against her by not making her the chairman of a department when the Respondent had not even reappointed her as a junior faculty member, is, in the words of District Court Judge David F. Hamilton, "patently" frivolous on the merits. Petition, App. B, p. 17.

The Petitioner was hired by the IUSM as an Assistant Professor as a "tenure probationary" employee for a period to end June 30, 1996. Thereafter, the Petitioner was notified of the Respondent's decision to not reappoint her to the IUSM faculty at the expiration of her existing period of employment. She was informed that the reasons for her non-reappointment were that she was unlikely to obtain external grant support and after careful consideration of overall performance.

In *Srivastava I*, District Judge McKinney granted summary judgment in favor of the Respondent and against the Petitioner on her claim that she was discriminated against by the Respondent when it decided not to reappoint her as a junior member of the IUSM faculty in the Department of Microbiology. In this lawsuit, the Petitioner has alleged that the Respondent discriminated against her when it decided not to make her an IUSM department chairman, after it decided not to reappoint her to the IUSM faculty. Such a claim is frivolous on its face. The Respondent's decision not to appoint the Petitioner as the chairman of an IUSM department that would not reappoint her as even a junior faculty member is plainly not discrimination.

The relief the Petitioner has continued to request the District Court grant her in her Revised Amended Complaint further evidences the frivolity of her claims. In each of the complaints filed by the Petitioner, she has asked the District Court to fire Gerald L. Bepko as Chancellor of IUPUI and replace him with the Petitioner because she is "more qualified than Bepko to be Chancellor," even though the Respondent's faculty and administration have determined that the Petitioner is not qualified to be reappointed as even a junior faculty member of IUSM. Just as incredible, the Petitioner has also asked the District Court to order the Respondent to: (1) authorize her to select the Respondent's administrators qualified to handle administrative positions; and (2) award her a law degree from the Indiana University School of Law.

B. The Petitioner Has Unreasonably Prolonged This Litigation

Since filing her Civil Rights Complaint against the Respondent on February 20, 1998, the Respondent has filed no fewer than five versions of her complaint, with various

revisions to her claims and allegations so as to avoid each argument the Respondent sets forth. In fact, she has come full circle — from claiming discrimination based on a disability, to withdrawing such claims and alleging discrimination based on her sex, and then back to disability discrimination.

On August 10, 1999, even after the District Court entered summary judgment against the Petitioner and twice denied her Motion for Partial Relief from Judgment, the Petitioner filed yet another Motion to Amend Complaint. This time she sought leave not only to add claims based on the ADA, the claims which she earlier had decided not to pursue, but to add, for the first time ever, a claim based on Title IX.

Throughout this litigation the Petitioner has also caused the Respondent to incur attorney's fees unnecessarily by filing "scandalous, irrelevant, redundant, and late" papers. The District Court, on at least six separate occasions, struck documents from the Court's record because they contained scandalous, irrelevant, redundant, and late allegations. In fact, the District Court struck a total of twelve of the Petitioner's filings. In several instances, the Petitioner made such scandalous allegations against the Respondent that a response in the form of a motion to strike under Fed. R. Civ. P. 12(f) was required, which caused the Respondent to incur attorney's fees which should not have been necessary. On other occasions the District Court, recognizing the inappropriateness of the Respondent's filings, struck them *sua sponte.* Awarding attorney's fees in favor of the Respondent on that basis was *not* an abuse of discretion.

III. The District Court's Decision to Grant Summary Judgment in Favor of the Respondent is Not on Appeal or Before This Court; Even if it Were, the District Court's Ruling Was Not an Abuse of Discretion and Does Not Involve an Important Issue of Federal Law That Has Not Already Been Decided

The Petitioner requests this Court consider the substantive basis of the District Court's decision to grant summary judgment in favor of the Respondent, i.e. that the Petitioner failed to file an appropriate EEOC Charge concerning her claims of sex discrimination prior to filing this lawsuit. Essentially the Petitioner requests this Court reconsider whether a plaintiff should be allowed to assert a Title VII claim for the first time in a lawsuit, where the plaintiff failed to mention a Title VII claim in her EEOC Charge.

The correctness of the District Court's granting summary judgment to the Respondent is not now on appeal. The Respondent acknowledged that she voluntarily chose to dismiss her appeal from the District Court's Summary Judgment Entry (commenced by her on June 2, 1999, and docketed herein on June 11, 1999, as No. 99-2427) and instead seek relief from the District Court through her motions under Fed. R. Civ. P. 59(e) and 60(b). As the District Court appropriately ruled and the Circuit Court affirmed, she thereby waived her right to appeal the District Court's Summary Judgment Entry. Accordingly, the Circuit Court did not review the substantive merits upon which the District Court granted summary judgment in favor of the Respondent.

Notwithstanding, the requirement that a plaintiff assert a Title VII claim in her EEOC Charge prior to filing a lawsuit

on that claim is well-settled law that was considered by this Court long ago in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1947). Allowing a complaint in litigation to include allegations outside the scope of the plaintiff's EEOC charge would frustrate the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge. *See Cheek v. Western & Southern Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994). Since this issue was well settled prior to the District Court's ruling, the Petitioner's lawsuit and continued arguments to the contrary are frivolous. *See Unity Ventures v. County of Lake*, 894 F.2d 250, 253-54 (7th Cir. 1990); *Reichenberger v. Pritchard*, 660 F.2d 280, 288 (7th Cir. 1981).

Although the Petitioner attempts to recharacterize the issue, the issue in this case is whether the plaintiff's Title VII claims in the complaint are "like or reasonably related to the allegations of the charge and growing out of such allegations." *Id.* In this case, they clearly are not. The Petitioner's Revised Amended Complaint relates to the EEOC Charge that she filed with the EEOC on August 29, 1997, in which she alleged, in pertinent part:

> I believe I am being retaliated against in not being considered for the Microbiology Chairperson position for filing a previous EEOC charge in violation of the Americans with Disabilities Act of 1990, as amended.

As the District Court correctly observed, "Plaintiff Srivastava's EEOC Charge No. 240972835 contains *not the slightest hint of sex discrimination.*" Petition App., p. 28. (Emphasis added). Nor does it contain any statement that can be said to encompass a claim of sex discrimination or retaliation based on complaints of sex discrimination.

The Respondent's only complaint in her *EEOC Charge* No. 240972835 is that she was not "considered for the . . . Chairperson position for filing a[n] . . . EEOC Charge in violation of the Americans with Disabilities Act. . . ."

The Petitioner is unable to identify any statements in her EEOC Charge No. 240972835 that would have put the EEOC or the Respondent on notice of discrimination based *on sex*. The present case is thus not at all like *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 168 (7th Cir. 1976), or *Sanchez v. Standard Brands, Inc.*, 431 F.2d 431 F.2d 462, 464 (5th Cir. 1970), cited to by the Petitioner in her Petition. In those cases, although the plaintiffs "checked the wrong box" in their underlying EEOC charge, they *did* include in their charges as submitted to the EEOC statements which included the allegations identified in such plaintiffs' subsequent Complaints filed in the district courts.

In her Petition, the Petitioner attempts to argue that the Seventh Circuit's holding in this case and the Fifth Circuit's holding in *Sanchez* is inconsistent with the Sixth Circuit's holding in *Ang v. Proctor & Gamble Co.*, 932 F.2d 540 (6th Cir. 1991). It clearly is not. In *Ang*, the Sixth Circuit affirmed the district court's ruling that the plaintiff failed to exhaust his administrative remedies for his race discrimination claim where he only alleged national origin discrimination in his EEOC Charge and failed to even mention or check the correct box for race discrimination. *Id.*, at p. 546.

Like the plaintiff in *Ang*, the Petitioner failed to even mention or check the correct box for sex discrimination in her EEOC Charge. In fact, there are absolutely no statements in the Petitioner's EEOC Charge that could reasonably be

construed to include her current claims of sex discrimination and retaliation based on complaints of sex discrimination.

In her Petition, the Petitioner cites to *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) to suggest that the Respondent had some obligation to identify a "legitimate, non-discriminatory reason" for taking the employment action it did before summary judgment could be granted in its favor on the exhaustion of administrative remedies issue. The Petitioner fails to acknowledge, however, that filing an appropriate EEOC Charge prior to filing a lawsuit in federal court is a condition precedent that must be satisfied before the defendant has any burden to prove the basis for its employment action. *Alexander*, 415 U.S. at 47.

IV. It Was Not an Abuse of Discretion to Hold That the Respondent's Motion Was Timely Filed; The Timeliness of Respondent's Motion is Not an Appropriate Issue For This Court's Consideration

In her Petition, the Petitioner argues that this Court should review the Circuit Court's determination that the District Court did not abuse its discretion in granting Respondent's Motion for Award of Attorney's Fees because the Motion was untimely pursuant to Fed. R. Civ. P. 54. The District Court's ruling that the Respondent's Motion was timely was within its discretion and clearly does not decide an important issue of federal law or of national importance.

The Petitioner argues that the Motion was untimely because it was filed more than fourteen (14) days after the entry of summary judgment in favor of Respondent and beyond the thirty (30) day deadline for filing such a Motion

under Local Rule 54.1 for the United States District Court, Southern District of Indiana, Indianapolis Division.

The District Court clearly did not abuse its discretion when it granted the Respondent's Motion for Award of Attorney's Fees. Under Fed. R. Civ. P. 54(d)(2)(B), a motion for attorney's fees must be filed within 14 days of the judgment unless extended by an order of the court. According to Local Rule 54.1 for the Southern District of Indiana, there is a 30-day deadline for filing motions for attorneys fees. Although Respondent's Motion for Award of Attorney's Fees was filed more than thirty (30) days after the entry of summary judgment in its favor, the Motion was filed only five days after the District Court denied Srivastava's Motion for Partial Relief from Judgment.

Respondent's Motion was clearly timely in that it was filed while Petitioner was continuing to litigate her frivolous claims, and thereby continuing to cause the Respondent to incur attorney's fees that it should not have had to incur. 42 U.S.C. § 2000e-5(k) plainly authorizes a district court's exercise of its discretion to entertain such a motion when the plaintiff is unnecessarily continuing to prolong the litigation. *Eg. Christiansburg*, 434 U.S. at 422.

Indeed, the Circuit Court ruled "that the deadline under Rule 54(d)(1) is not jurisdictional because Fed. R. Civ. P. 6(b) allows a court to grant an extension of time with respect to most rules, including Rule 54(d)." Petition, App., p. 7 *citing Lorenz v. Valley Forge, Ins. Co.*, 23 F.3d 1259, 1261 (7th Cir. 1994). The Circuit Court further held that

> in accepting IU's motion for attorney's fees under Rule 54(d)(2) as timely and then granting the motion, the district court implicitly extended

> the deadline for filing a motion under Rule 54(d)(2). The district court did not err in accepting the motion, particularly in light of Srivastava's baseless and repetitive filings after summary judgment had been entered and her first post-judgment motion had been denied.

Petition, App. A, p. 7.

CONCLUSION

Based on the foregoing, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DOUGLAS B. KING
Counsel of Record
MICHAEL RABINOWITCH
WOODEN & MCLAUGHLIN LLP
Attorneys for Respondent
1600 Capital Center South
201 North Illinois Street
Indianapolis, Indiana 46204
(317) 639-6151